Department of Law Monthly Report

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In This Issue

Commercial Section

Superior Court Sets Trial Date in *Botelho v. Griffin*

The Attorney General brought this action to force the professionals who conducted charitable gaming to disgorge money that they received through the violation of Alaska's gaming laws. Under those laws, a certain percentage of the money should have been paid to charities.

During September, Judge Rindner granted the state's motion to amend the complaint in this case to add claims that accrued after the filing of the original complaint in 1998. The judge also scheduled the case for trial in October of 2002. AAG Dan Branch is handling this litigation.

Consumer Protection

Complaint Filed Against Mortgage Company

AAG Cindy Drinkwater filed a complaint against City Mortgage Corporation and its CEO and president, James M. Crawford, for violations of

the Unfair Trade Practices and Consumer Protection Act, common law fraud and conversion, and violations of the Good Funds Act. The complaint alleges that the defendants failed to properly maintain escrow accounts, unlawfully promoted and sold travel certificates, and failed to remit mortgage payments to mortgage holders.

Fair Business Practice

Chugach Appeals RCA Ruling

AAGs Ron Zobel and Ed Sniffen argued for the Regulatory Commission of Alaska (RCA) before the Alaska Supreme Court in an appeal by Chugach Electric Association. Chugach attempted to serve retail customers in Municipal Light and Power (ML&P) territory. The commission sustained a complaint by ML&P and held that Chugach could not serve those customers without a certificate of convenience and necessity issued by the commission. The ultimate issue is the authority of the commission to decide if and when retail electrical competition is to be implemented in Alaska. Chugach also raised antitrust issues that were addressed by AAG Sniffen.

Due Process Issue Appealed

AAG Zobel also is representing the RCA in an appeal by the Alaska Exchange Carriers Association (Alaska local phone companies) concerning the rejection of tariff provisions without an evidentiary hearing. The tariff provisions concerned the procedure for changing the "first point of contact" with long distance companies. The issue is whether written comments on a matter of policy complied with the statutory requirement of a "hearing" and due process. AAG Zobel has prepared and filed the RCA's respondent's brief in the matter.

RCA Grants Rate Reduction in Golden Heart Utilities Case

AAG Steve DeVries received a favorable decision in a rate case before the RCA where he is representing the Public Advocacy Section (PAS) of the RCA. This case involving Golden Heart Utilities (GHU) went to hearing before the RCA in May 2000. The principal issue in the case was the question of whether the utility would be able to include approximately $13 million in the rate base for a plant donated at no cost to the utility by the City of Fairbanks when the city sold the utility to GHU in 1996. If allowed to do so, GHU would be allowed to earn a return on this amount through rates charged to its customers.

At hearing, the PAS, represented by AAG DeVries, argued that although substantial public benefit had been demonstrated, an additional showing should be required before any utility should be allowed an increase in rate base under these facts. Specifically, the PAS argued that, in the absence of extraordinary circumstances, no rate base adjustment should be allowed, and that, following the six-day hearing, GHU had demonstrated none. An intervenor in the case, J&L Properties, argued no public benefit had been shown to warrant the write-up in rate base.

In its decision on the matter, the RCA ordered water rates decreased 9.742 percent, but allowed a sewer rate increase of 1.284 percent. The sewer rate increase was substantially lower than that requested by the utility. The RCA concluded the rate base write-up should not be allowed because GHU had not demonstrated that rate-payer benefits were at least equal to the added rates they would pay if the rate base write-up was allowed. The net effect of this decision is that utility rates are reduced accordingly. A reconsideration request filed by the utility is pending.

Governmental Affairs

Dismissal Granted:

Withdrawal of Job Offer Did Not Violate Due Process Rights

Superior Court Judge Rene Gonzalez has dismissed a former state employee's Section 1983 due-process claim against a state human resources manager. The former employee claimed that the human resources manager violated his due-process rights by failing to give him a hearing before withdrawing a job offer that the former employee had already accepted. Judge Gonzalez agreed with our argument that, when the human resources manager withdrew the job offer in 1998, the law was not clearly established that a probationary employee covered by the General Government Unit contract had a property interest in continued employment. Accordingly, Judge Gonzalez agreed that the human resources manager was entitled to qualified immunity.

In response to our summary judgment motions in the case, the former state employee agreed to dismiss with prejudice his claims against the human resources manager, a commissioner, and the State of Alaska for violation of his freedom of speech, violation of the Alaska Whistleblower Act, and contractual interference. Jury trial on his only remaining claim -- for violation of the implied covenant of good faith and fair dealing -- is scheduled to begin November 5.

FREE REPRESENTATION DENIED

United States District Court Magistrate Judge John Roberts denied a state employee's request for appointment of an attorney to represent him in his race-discrimination claims against the State of Alaska and 18 former and current state employees. The employee -- who still holds a full-time job with the state -- asserted that he needed assistance to present his case. Magistrate Judge Roberts concluded that the employee is not entitled to free representation now, although he can renew his request if the case proceeds to trial.

STATE OF ALASKA FILES 9th CIRCUIT BRIEF IN SOFT MONEY CONTRIBUTION CASE

The State of Alaska recently filed its opening brief in the United States Court of Appeals for the Ninth Circuit in a case involving a matter of first impression: the validity of a state's regulation of "soft" money contributions to political parties. Soft money contributions are distinguished from "hard" money contributions in that soft money does not comply with Alaska's restrictions on the source or amount of permissible contributions. The state appealed a judgment by United States District Court Judge James Singleton that found Alaska's restrictions on contributions to political parties in violation of the First Amendment. Judge Singleton ruled that corporations, other entities, and individuals can contribute unlimited amounts of money to political parties, as long as the money is not used to influence the nomination or election of candidates. The ruling invalidated Alaska laws limiting individual contributions to parties to $5,000 per year and prohibiting corporate and labor union contributions to parties. Since the ruling, corporations have contributed tens of thousands of dollars to Alaska political parties. The state has filed a motion to stay the district court judgment with the Ninth Circuit.

Two amicus briefs were filed in the Ninth Circuit in support of the state's opening brief. The National Voting Rights Institute in Boston filed one brief, while the Brennan Center at the New York University Law School filed the other brief. Signing on to the Brennan Center brief were Senators John McCain (R-Ariz.) and Russell Feingold (D-Wis.), as well as Representatives Christopher Shays (R-Conn.) and Martin Meehan (D-Mass.), sponsors of legislation that would ban soft money contributions at the federal level. The amicus briefs support the

state's position that Alaska's limits are constitutional because large contributions can create the appearance of corruption, or even actual corruption, in the political process. The United States Supreme Court has never explicitly considered limits on soft money contributions, but has ruled that hard money contribution limits are constitutional if designed to prevent the appearance of corruption.

Human Services

Personnel Changes

Bethel has a new attorney hire in Erin McCrum. Erin came to us from clerking for Judge Curda. He recently passed the bar exam. Welcome Erin!

AAG Poke Haffner has now transferred to the Fairbanks office. Poke was in the AGO in Fairbanks several years ago, left the country, and then decided to come back. She worked in the Bethel AGO during the back-to-back maternity leaves of AAGs Kathy Hansen and Christi Pavia. She then came to Fairbanks to join the Human Services section.

Legislation/Regulations

REGULATIONS AND LEGISLATION TRAINING CONDUCTED

During September the Legislation and Regulation Section conducted several training classes.

On September 14, the section conducted a statewide video-conference on regulations training for state agencies in Anchorage, Juneau, and Fairbanks. Over 65 state employees attended the classes.

The legislation and regulation section provided training on regulations for over 25 assistant attorneys general in Anchorage and Juneau. The section also provided legislation drafting training for Anchorage AAGs.

Feedback from all the classes was favorable and students expressed a desire for additional classes in the future.

The section also processed regulations on fish and game, eligibility for Permanent Fund dividends for certain aliens, Board of Agriculture and Conservation matters, occupational licensing fees and other issues, vehicle size and weight restrictions, and Medicaid payments for personal care attendant services.

The section has also begun processing initial drafts of legislation for the governor consideration for the 2002 bill package.

Natural Resources

CIRI Moquawkie Oil and Gas Lease Settlement

A settlement was recently finalized with CIRI in which the state paid CIRI $45,750 for its collection of rental payments allegedly belonging to CIRI. The state had received rental payments on three oil and gas leases in the total amount of $39,500 going as far back as 1974. The lands were selected by and ultimately conveyed to Tyonek Native Corporation. CIRI argued it was entitled to reimbursement for the lease payments because under ANSCA, CIRI was to receive rights to the subsurface on all lands selected by Tyonek.

Steller Sea Lion Issues Continued

AAG Jon Goltz attended a special meeting of the North Pacific Fisheries Management Council in Sitka focused solely on the endangered western stock of Steller sea lions. The National Marine Fisheries service has

determined that the federal groundfish fisheries planned for 2002 will not threaten the continued existence of sea lions, but that determination is based on an assumption that the State will adopt significant restrictions on groundfish fisheries in state waters. The Alaska Steller Sea Lion Restoration Team has issued a report concluding that the scientific evidence tends to show such restrictions are not necessary. AAG Goltz has assisted the Department of Fish and Game in preparing written comments on the most recent federal biological opinion and environmental impact statement. Also, AAG Goltz and AAG Lance Nelson are preparing to advise the Alaska Board of Fisheries on related issues at the Board's November meeting.

Suit to Force Governor Knowles to Appeal Katie John Fails

The Alaska Constitutional Legal Defense Conservation Fund, Warren Olson, and Dale Bondurant filed a complaint against the governor and motion for a mandatory injunction to file a petition for certiorari to the U.S. Supreme Court in the case. The Ninth Circuit had upheld its earlier ruling that ANILCA's definition of federal public lands in Alaska included navigable waters in which the federal government had reserved water rights. After obtaining a 60-day extension for filing a petition for certiorari, Governor Knowles announced that the state would not appeal. The plaintiffs then filed suit in Anchorage Superior Court to force the governor to appeal, arguing that the equal access provisions in our state constitution created a special fiduciary duty requiring the governor to take all actions possible to preserve access opportunities, even in litigation involving the interpretation of federal, not state, law. Judge Reese ruled that the question was not justiciable and that any injunction would violate the separation of powers doctrine. The Alaska Supreme Court affirmed two days later on a petition for review.

Patyten Case Continues

In May of this year, plaintiff Paul Patyten filed a lawsuit in federal court against numerous defendants, including a Department of Fish and Game employee, accusing her of slander and giving him misleading and fraudulent information about open fishing areas. The other claims were against various City of Sitka defendants who were alleged to have been responsible for the sinking of Mr. Patyten's boat, and the towing and destruction of his truck. Mr. Patyten sought damages of $2,500 for his truck, around $300,000 for his boat, and $13,000,000 in punitives. In addition, Mr. Patyten requested an apology and a declaratory judgment as follows: "to be treated as an ordinary member of the community and not as a crazy man."

Mr. Patyten asserted federal court jurisdiction under the American's with Disabilities Act. Mr. Patyten claims to have been disabled by an accident which left him with "a brain injury which resulted in dyslexia and major communication difficulties. . . . "

At the meeting of the parties to discuss the trial schedule Mr. Patyten repeatedly told counsel for defendants that we were only increasing the damages we were going to have to pay by making him go through the required meeting which was causing him a lot of anxiety.

Mr. Patyten also tried a new tactic - he sent an audio tape to the defendants with what could loosely be called his initial disclosures, and discovery requests, asking the state to produce and subpoena his witnesses for trial. The defendants objected to the oral requests and the court agreed that such disclosures and requests had to be in writing.

In September, the state filed a motion for judgment on the pleadings, based on Eleventh Amendment immunity and lack of subject matter jurisdiction.

Mr. Patyten did not file an opposition to the state's motion, and it was granted by the court.

NEW ATTORNEYS IN JUNEAU

During the summer, two attorneys joined the Juneau Natural Resources Section. In July, Kirsten Swanson replaced Lisa Weissler as the state's principal attorney on coastal management issues. Before joining the department, Kirsten worked in Juneau as an Assistant Public Defender. She also has been a defense attorney with the Army JAG Corps. Kirsten has been busy briefing several appeals of coastal consistency determinations that deal with oil production, log transfer facilities, and postal delivery by hovercraft.

In August, Sara Trent took the environmental law position vacated by Steve Daugherty. Sara had been a legal intern for the Juneau office and, after graduating from law school, served as a law clerk to Juneau Superior Court Judge Patricia Collins. Her recent projects include preparing compliance orders by consent, drafting air quality regulations, and assisting on cruise ship issues.

Kirsten and Sara came highly recommended to the department, and they have quickly learned these new areas of practice.

Oil, Gas, & Mining

Chevron-Texaco Merger Case Settled

The section represented Alaska in multi-state negotiations to resolve concerns about how a proposed merger between Chevron and Texaco would affect competition. Currently, Texaco (through a joint venture with Shell) and Chevron are among the four major gasoline marketers in the state, and Texaco and Chevron are the only suppliers of aviation gasoline. A consent judgment was filed in U.S. District Court in Los Angeles, which among other things requires Texaco to divest its interest in nationwide gasoline refining and marketing, as well as its general aviation fuel business in a number of states including Alaska. The FTC has also proposed a consent order with similar remedies.

Marathon Oil Company and State Resolve Disputes

Marathon Oil Company and the Department of Natural Resources (DNR) agreed to resolve disputes regarding Marathon's royalty obligations for gas produced from Marathon's Cook Inlet leases for January 1, 1989, through December 31, 1997. Marathon paid $7,750,000 in additional gas royalties for that period. Marathon and DNR also agreed to a methodology to govern valuation of gas delivered to the Nikiski Liquified Natural Gas (LNG) plant from January 1998 on. The agreement adopts the methodology used by the Department of Interior for gas produced by Marathon from federal leases in Cook Inlet and delivered to the LNG plant. AAG Mike Barnhill represented DNR in negotiating the resolution of these disputes.

Transportation

Alaska v. Norton Finished

Alaska v. Norton, United States, William T. Bryant (No. A94-0301-CV (HRH)), involving a conflict between a highway right-of-way and a Native allotment, has been the subject of many reports over the years. This past summer, we reported that the federal defendants had appealed the district court's decision on the merits in favor of the state to the Ninth Circuit. That appeal has now been voluntarily dismissed by the federal defendants. This case is finally over, after having been in continuous litigation since 1988, when the state filed a complaint for a contest hearing with the Board

of Hearings and Appeals of the Department of the Interior.

The ultimate outcome of the case is precisely the same (and based on exactly the same legal argument) as what the state asked for in a dispositive motion filed in 1988 prior to the contest hearing. That motion was denied by the hearing officer (without a reason being given). However, as a result of the litigation, we now have some very good law in a published decision.

Alaska v. Babbitt (Bryant), 182 F.3d 672 (9th Cir. 1999). This is the ruling by the Ninth Circuit establishing that the federal district court has subject matter jurisdiction to hear the state's action for judicial review of the IBLA decision in the Bryant allotment case. We have also recently asked West Publishing to consider publication of the 15-page district court decision on the merits, which also contains some very good law for the state.

Special Litigation

STATE PREVAILS IN APPEAL FROM BENEFITS AWARD: DEP'T OF ADMINISTRATION V. WORKERS' COMPENSATION BOARD

The Alaska Workers' Compensation Act provides vocational retraining benefits to some injured workers. To qualify workers must be physically unable to return to their current jobs or any available job they held or received training for in the 10 years prior to injury.

In this case (Dep't of Administration v. Workers' Compensation Board) a worker developed a skin condition on his hands while a part-time dishwasher at the Anchorage Pioneers' Home. Several years before, under a federal retraining program for displaced oil field workers, he had completed an associate's degree in electronics technology at UAA with honors.

At hearing the Department of Administration, represented by AAG Paul Lisankie, argued that the skin condition did not keep the worker from performing several jobs for which the electronics training qualified him. Consequently, the worker should not be found entitled to retraining benefits under the Act.

The Alaska Workers' Compensation Board agreed the skin condition would not interfere with electronics work. However, the board found that other physical restrictions unrelated to work at the Pioneers' Home (due to age and slight stature) could limit the ability to perform electronics work. The board concluded that the Act required the state to provide retraining benefits even though the qualifying physical restrictions were completely unrelated to the skin condition developed at the Pioneers' Home.

The state appealed, arguing the board had misinterpreted the Act's vocational retraining provisions. In an opinion issued on September 5, the superior court agreed and reversed the Board's award. The court concluded that retraining benefits cannot be awarded unless the inability to return to work is attributable to the affects of the work injury rather than other unrelated restrictions.

WORKERS' COMPENSATION BOARD DENIES CLAIM FOR MEDICAL BENEFITS IN FABER V. DEP'T OF COMMUNITY & ECONOMIC DEVELOPMENT

The Alaska Workers' Compensation Board denied this claim for additional medical benefits after a hearing in Anchorage. The claimant, an office manager, initially received medical benefits for neck pain attributed to a poorly configured workstation. Later, the claimant's treating physicians and the department's medical expert disagreed over whether the workstation or previous off-work injuries caused the need for ongoing medical treatment.

As provided by the Alaska Workers' Compensation Act, the board retained an independent medical expert to assess the neck condition and the disputed medical opinions. The board's expert concluded that the disputed medical treatments were attributable to the off-work injuries.

The Department of Community & Economic Development, represented by AAG Paul Lisankie, argued at hearing that the board and department medical experts' opinions combined to outweigh the contrary opinions of the claimant's physicians. Since the board must base its findings on the preponderance of the relevant evidence, the claim for additional medical benefits should be denied and dismissed. In a September 20 decision the board agreed. It denied the claim based upon its finding by a preponderance of the evidence that the ongoing need for medical treatment was due to the off-work injuries rather than the workstation configuration.

Claim Against DOT Denied

The Department of Transportation successfully defended a claim by an aircraft operator that the state negligently placed a sign approximately 35 feet from the edge of the taxiway which he struck with his aircraft. The state argued that the placement of the sign was protected by discretionary function immunity and therefore judgment in favor of the state was ordered by the trial court. The case was briefed by AAG Robert Doehl.

Alaska Supreme Court Hears Rollover Case

The Alaska Supreme Court heard oral argument in *Wells v. State* in which the State is defending the grant of summary judgment by the trial court on a claim of failure to install a guardrail. The case was tried to the jury on the remaining theory of negligent road maintenance, which resulted in a verdict in favor of the state. Plaintiff appealed both the summary judgment and the jury verdict. Plaintiff was the driver in a single vehicle rollover on DeArmond Road in Anchorage. The case was handled at the trial court and on appeal by AAG Venable Vermont.

The state's appellee's brief was filed in the Alaska Supreme Court defending a grant of summary judgment to the Department of Corrections on an inmate claim of intentional infliction of emotional distress arising out of alleged untimely provision of medical care. The trial court had previously granted judgment in favor of the state on a claim of medical malpractice. Plaintiff appealed on the emotional distress claim. AAG Venable Vermont represented the Department of Corrections at the trial court and on appeal.

Criminal Division

ANCHORAGE

Eugene Poirier was sentenced to 30 years, with a stipulated parole restriction, for murder in the second degree. In 1995, Doris Hainta was strangled to death and her body was dumped by Ship Creek. Poirier was identified through a positive DNA match. In 2000, he confessed. He is currently serving time for the murder of a sixteen-year-old girl in North Carolina. The girl had been strangled to death, as well. There, he pled to murder in the second degree and received a sentence of 22-28 years in jail. North Carolina Police, during their investigation, inquired about Poirier, since he lived in Alaska once. An Anchorage detective pieced together that Poirier had a blue van (a vehicle identified by a witness) and worked near where the body had been found. A blood sample from Poirier matched the DNA sample taken from Hainta.

In Unalaska, 16-year-old Grigori Zuboff was charged with murder in the first degree for the shooting death of his 20-year-old brother. A juvenile said that the younger Zuboff wanted to kill his older brother because the brother did not

take him seriously and had given him a black eye.

Robert Richardson was sentenced to a total of 13 years in jail for murder in the second degree and assault in the first degree. He received 10 years for the murder charge and five years with two years concurrent on the assault charge. In 2000, there was a string of serious injury/fatality DWI collisions. This one involved the death of two children on Portage Valley Road in Portage. Before the collision, Richardson's truck was pulled out of a lake by a tow truck. The tow truck operator told Richardson he was too drunk to drive, but Richardson drove anyway. Shortly thereafter, Richardson collided head-on with a vehicle driven by Kevin Blake. Blake and his 11-year-old cousin were killed. Blake's grandparents were seriously injured.

Two of the five men who were responsible for the shooting death of Michael Broumley received 30 years in jail. The men had been convicted of murder in the second degree.

Samuel Camanga pled no contest to murder in the first degree and agreed to serve 75 years in jail for the shooting death of Frances Gorsche. Shane Clapper and Paul Munson are also charged with murder. In September 1999, Gorsche's body was discovered by a moose hunter along the Eklutna Lake Road. He had been shot in the head. A 14-year-old co-defendant allegedly hired Camanga to kill Gorsche because he believe Gorsche had sexually assaulted a 4-year-old.

Timothy Wade pled no contest to one consolidated count of attempted murder. Wade stabbed his wife and eight-year-old son and chased his wife as she tried to flee. The eight-year-old boy, who had multiple stab wounds in his chest and neck, grabbed his eighteen-month-old sister and ran out of the house. Once they were out of the house, a female passer-by came to the aid and carried them to safety.

Ho Sik Kwon was sentenced to 21 years in jail with 9 years suspended and 10 years of probation. Kwon was convicted of murder in the second degree for the death of a fellow karaoke singer, Chang Do Woo. In October 1998, a fight broke out between two men over who would sing first. Woo was trying to break up the argument. Shortly afterward, the parties left the bar. Kwon drove his truck into a group and struck Woo, who was near the building and could not get away.

Sammie Jerry was charged with murder in the first degree for the stabbing death of Douglas Gibson. Gibson had given Jerry's girlfriend a ride. When Gibson and the girlfriend arrived at Jerry's apartment, Jerry punched his girlfriend and accused Gibson of trying to get next to her. Gibson told police that he punched Jerry back and told him, "Why don't you hit a man instead of a woman?" Jerry then pulled out a butcher knife and stabbed Gibson in the stomach.

Jason Pritchard announced he would plead to two consolidated counts of attempted murder for the slashing of four eight-year-old boys. In May 2001, children were lined up for early morning breakfast at the Mountain View Elementary School. Pritchard approached the children and started slashing their throats with a fillet knife. When police arrived, a teacher was holding Pritchard at bay from a boy who had already been slashed. The police were able to use less lethal weapons to place Pritchard in custody approximately 15 minutes after the incident began. The change of plea is scheduled for October 8, 2001.

Gregory Poindexter pled no contest to one consolidated count of sexual assault in the first degree and one consolidated count of kidnapping. Poindexter picked up intoxicated women around the time bars closed and offered them rides. He would take them to remote areas, rape them, and then drop them off near their homes. The violence of the assaults kept escalating and the final victim had several facial bones broken.

BETHEL

Judge Curda issued his decision waiving Brandon Petluska into adult court for an October 1999 murder of an elderly man that he committed when he was 15 years old. He is currently charged by information with murder in the first degree.

Howard Wassalie was found not guilty of two counts of sexual assault in the first degree and one count of sexual assault in the second degree after a jury trial.

Jimmy Lomak was found guilty of DWI and not guilty of disobedience to signals of an officer and reckless endangerment after a jury trial.

Leonard Olrun was found guilty of two counts of sexual assault of a minor in the third degree and one count of violating conditions of release after a jury trial.

A jury found Tommy Queenie guilty of two counts of assault in the third degree, one count of cruelty to animals, one count of criminal mischief in the third degree, and one count of misconduct involving weapons in the fourth degree. The jury found him not guilty of one count of assault in the second degree, one count of assault in the third degree, and two counts of assault in the fourth degree.

Numerous defendants were indicted by the grand jury.

CORRECTIONS

The supreme court affirmed the administrative revocation of Dennis Snyder's driver's license for refusal. The administrative revocation was stayed while Snyder litigated his criminal case. He was criminally convicted of refusal, but the supreme court later reversed the conviction. The Division of Motor Vehicles afforded Snyder an administrative hearing on the revocation of his license for refusal, and found that his license should be suspended because he had refused to take the breath test. Snyder appealed, claiming that DMV failed to afford him the remedial presumption created in the court's earlier decision. The supreme court ruled that he was entitled to the presumption of a favorable result, but that the error was harmless. Snyder v. State, Dept. of Public Safety, Div. of Motor Vehicles [Opinion No. 5480 – September 28, 2001].

The court of appeals, in an unpublished decision, upheld the dismissal of Alphonso Harris' PCR in which he challenged the parole board's requirement that he participate in sex offender treatment as a condition of mandatory parole.

The criminal division is also defending a civil action in superior court in Anchorage in which the Mechanical Administrators of Alaska, Inc. (MCA) challenge the Department of Public Safety's adoption of the International Mechanicl Code (through the State Fire Marshal) as the current mechanical code in the state. MCA is seeking both injunctive and compensatory relief based upon their view that only the legislature can halt the use of the Uniform Mechanical Code in Alaska.

DILLINGHAM

William Yohak was indicted by grand jury for two counts of murder in the first degree for the death of a 14-year-old girl and a 31-year-old man in Manokotak, 25 miles southwest of Dillingham. He is also indicted on charges of sexual abuse of a minor and tampering with evidence. The man’s body was discovered on February 7, 2001; five days later the girl’s body was discovered hidden under debris a the village landfill. Both died as a result of a .22 caliber magnum gunshot wound.

FAIRBANKS

Billy Jo Drucyk was sentenced to 25 years by Judge Steinkruger on a second-degree murder conviction for stabbing his best friend to death at a party. Nicholas Danico plead to murder in the first degree for stabbing a woman to death

in her bathroom for the thrill of it. Norman Lolnitz was sentenced by Judge Savell to 99 years with 50 years suspended for shooting and killing a drinking buddy during an alcohol-induced rage.

Kirk Jackson was sentenced to 20 years with 15 years suspended by Judge Pengilly on a manslaughter conviction arising out of a drunk driving collision that killed a teenage girl. James Oden, a fire chief who embezzled over $50,000 from a volunteer fire department, was convicted of theft in the first degree by a Fairbanks jury after a 2-week trial.

Daniel Lewis was indicted for criminal mischief in the first degree and assault in the third degree for shooting a hole in the pipeline and threatening to shoot his brother if he squealed on him.

The Fairbanks DAO welcomed aboard new ADA Jean Seaton.

JUNEAU

Joseph Jacobs, Jr., was convicted of assault in the second degree in a re-trial. Jacobs had punched a person in the eye. At the time of the first trial, the victim was blind, but by the time of the re-trial, he had regained his sight. Even with this change the jury convicted Jacobs.

A Haines man, Robert Skulka, was indicted for murder in the second degree. He struck his victim, knocking him to the ground, and then kicked him, rupturing the victim's portal vein, which caused blood loss and resulted in death.

A week after the World Trade Center attack, a man whose luggage did not arrive when he did at the Juneau International Airport told an airline employee that the suitcase contained a bomb. He then explained he was joking. He is charged with terroristic threatening. Juneau police contacted the FBI for advice; the FBI requested that the suitcase be searched and X-rayed once it arrived in Juneau. Due to concern for the passengers on the flight on which the suitcase was to be shipped, Assistant District Attorney David Brower had the bag X-rayed and searched before the plane left Seattle for Juneau. There was no bomb.

KODIAK

A woman was sentenced to 36 months in jail with 26 months suspended and placed on probation for 10 years following her conviction for theft in the second degree, a class C felony. In addition to other conditions of probation, the defendant was also ordered to pay $39,000 in restitution to the daycare center for which she had formerly been the director. The court also ordered 9 percent interest to be paid on the restitution balance until it is paid.

A man was sentenced to five years in prison, with three years suspended, upon his conviction for misconduct involving a controlled substance in the fourth degree, a class C felony. This defendant had forged a medical prescription for vicodin to get ten times as many tablets as had been prescribed to him, then turned around and sold them on the open market. This defendant will be on probation for seven years after his release from prison.

A man was convicted of assault in the fourth degree and misconduct involving weapons in the fourth degree, both class A misdemeanors, following his drunken rampage during which he threatened several people with a pistol. This defendant received a composite sentence of 24 months in jail with 16 months suspended and was placed on probation for five years. The man was also ordered to be screened for alcohol abuse and to complete residential treatment of up to 90 days, if recommended.

The grand jury indicted three men for multiple counts of felony theft and burglary charges following a rash of boat break-ins in St. Paul's and St. Herman's harbors this last summer. November trial dates have been set.

KOTZEBUE

Steven Cleveland was convicted of sexual assault in the second degree and assault in the second degree. Cleveland had previously been tried in June, but the jury had been unable to reach a verdict on those counts (he was convicted of a felony homebrew manufacturing count in June). The September trial occurred during the week of the World Trade Center attack, so there were substantial problems in getting witnesses in to Kotzebue for trial. A number of witnesses testified telephonically and we were ultimately able to charter a plane to get witnesses in from Ambler and successfully complete the trial.

A lengthy evidentiary hearing was held in the case of State v. Mahlon Uhl. The issue surrounded the warrantless entry into a residence after the defendant's sister called the police, requesting assistance at her father's house. When the police arrived, the sister let them into the residence; where Uhl was assaulting his father. By the time of the evidentiary hearing all the family members had changed their stories and were contending that the police just barged in. Judge Erlich was more convinced by the police tape recording of the contact; he ruled that the police entered with the consent of the sister and that she had the apparent authority to give that consent.

NOME

The scheduled sentencing of Adam Kasgnoc, who had pled out to the sexual abuse of his daughter over an extended period of time, was delayed as the defendant fired his lawyer and attempted to withdraw his plea. Judge Esch refused to allow the plea withdrawal, but sentencing has been delayed until the defendant's new lawyer gets up to speed.

Two remarkably similar vehicle theft cases were submitted for prosecution. In both cases the intoxicated defendants took off in vehicles owned by persons who were just trying to help the defendants out. In both of the unrelated cases, the defendants promptly drove off the road into a ditch and were, equally promptly, arrested. Fortunately neither vehicle suffered significant damage.

David Cothern was arrested on a felony domestic assault—apparently he felt that a handgun would be a particularly compelling aid in his child custody discussion with his ex-girlfriend.

Other new cases include a couple of bootlegging cases from Gambell and a felony domestic assault in Nome.

PALMER

John Nichols was sentenced to serve 60 years, with 30 years suspended, for the shaking death of Tyler Cope, his 7-month-old daughter. Nichols was convicted of second degree murder. At trial and sentencing, Nichols maintained he did not remember what happened to the child. The autopsy showed the baby was forcefully shaken; bruises were present on her face, neck and arms. Nichols was on felony probation for burglary and had been previously convicted of misdemeanor assault.

Conrad Pieske was sentenced to 800 days with 670 suspended, 10 years probation, loss of hunting/trapping license for 5 years, and forfeiture of his 30:06 rifle. The judge ordered that he cannot even be in the field with anyone who is hunting or trapping. After a long jury trial, Pieske was convicted of wanton waste, illegal take, illegal transportation, and attempted evidence tampering. He had shot a cow moose, cut off its head, and dragged it back to his cabin where he let it rot for 4 months. He wasted the whole animal. A witness told FWP that he was going to use it for bear bait during a spring hunt with friends from Arkansas. She said they were going to sell bear parts.

Larry Dean Sandson was indicted on four counts of sexual abuse of a minor in the first degree and four counts of incest, for abuse occurring over the summer.

OSPA
(Office of Special Prosecutions & Appeals)

Prosecution News

Redding sentenced to nine months' imprisonment for welfare fraud. After entering a plea of no contest to one count of theft in the third degree, Milysha Redding was sentenced to twelve months with three months suspended (nine months to serve). Redding also will be required to pay full restitution in the amount of $3,056.00. Redding fraudulently received public assistance by failing to disclose household income to the Division of Public Assistance.

Klepinger convicted of mail fraud. The joint federal and state investigation and prosecution of hearing-aid provider Kenneth Klepinger culminated in a jury verdict of guilty on one count of federal mail fraud in U.S. District Court. The jury hung on several other counts and acquitted Klepinger on several more. Mail fraud is in violation of 18 USC section 1341 and is punishable by imprisonment for up to 5 years or a fine up to $5,000 or both.

Petitions of Interest

Independent blood-test – advice by police officer. The state urges the supreme court to review the court of appeals' decision in *MacLeod v. State*, Op. No. 1759 (Alaska App. 2001). Defendant Bradley MacLeod decided to forego the independent blood test after the arresting officer told MacLeod's mother that the blood-test result often is higher than the breath-test result. The court of appeals held that the officer, by providing this information, had interfered with MacLeod's right to an independent blood test. In its petition for hearing, the state argues that information of this kind does not qualify as interference with the right to an independent test. The state emphasizes that: the officer's statement was made in response to a tearful plea by MacLeod's mother for additional information about the advisability of obtaining the independent test; the officer's motives were entirely benevolent; and even MacLeod's attorney conceded that the information the officer provided was accurate. *State v. MacLeod,* No. S-10329.

Plea agreements – prosecutor's discretion to reduce charge. The state argues that a charge of second-degree failure to register as a sex offender will lie against a defendant who has a prior conviction for failure to register and who therefore could be prosecuted for first-degree failure to register. In this case, Judge Finn said she could not ignore the defendant's prior conviction for failure to register and therefore could not accept his plea to a charge of second-degree failure to register. The defendant joined the state's petition. *State. v. District Court*, No. A-8101.

Briefs of Interest

Search and seizure – use of "Itemiser." The state argues that use of an Ion Track Instruments Itemiser to detect controlled substances on the exterior of a package does not qualify as a search for purposes of the fourth amendment. *McGee v. State*, No. A-7697.

Drunk driving – prior convictions from other jurisdictions. The state argues that a defendant's prior drunk-driving convictions from Montana qualify as prior convictions under AS 28.35.030(o)(4) and therefore can serve as a predicate for imposition of felony liability. In this case, Judge Motyka held that the elements of the Montana offense are not similar to the elements of the Alaska offense. He relied on the fact that Montana's statute imposes strict liability. But the state argues that Alaska's

statute also imposes strict liability. *State v. Simpson,* No. A-8028.

Investigatory stops – witnesses. The state argues that a police officer was justified in stopping a vehicle near the scene of a reported stabbing to ascertain the identities of its occupants, whom the officer considered potential witnesses. The state relies in part on the fact that the vehicle's license plate was obscured by snow. *Hamilton v. State*, No. A-7762.

Court Decisions of Note – Alaska

Professional responsibility – ascertainment of facts. An attorney must make a reasonable effort to verify the facts before he makes a factual assertion in a pleading or brief; it is not enough that the attorney believes the assertion to be true, nor is it enough that he or she lacks any affirmative basis for believing the assertion to be false. In this case, attorney Eugene Cyrus asserted in an appellate brief that the defendant, his client, had been convicted at a bench trial. In fact, the defendant had entered a Cooksey plea. This fact proved critical to the court's resolution of the case, since the issue supposedly preserved pursuant to the Cooksey plea was not subject to preservation. *Tyler v. State,* Op. No. 1763 (Alaska Court of Appeals, 9/14/01).

Professional responsibility – citation of adverse authority. An attorney's ethical duty to cite adverse authority is not limited to adverse authority that necessarily will be deemed dispositive of the attorney's case. Rather, the attorney's ethical duty to cite adverse authority extends to any adverse authority that "would reasonably be considered important" by the judge(s) sitting on the case. In this case, attorney Eugene Cyrus failed to cite an Alaska Supreme Court decision that ultimately was deemed dispositive by the Alaska Court of Appeals in his case. When asked to explain his failure to cite the supreme court decision, Cyrus said he thought his case was distinguishable. But the court of appeals said an attorney is ethically required to cite even an adverse decision he considers distinguishable, so long as the decision would reasonably be considered important by the judge. *Tyler v. State*, Op. No. 1763 (Alaska Court of Appeals, 9/14/01).

Search warrants – type of offenses for which warrant may issue. The statutory authority of judges and magistrates to issue search warrants is not limited to cases involving serious "criminal" offenses. Warrants may issue even for evidence of "violations" such as minor consuming alcohol. *State v. Euteneier*, Op. No. 1764 (Alaska Court of Appeals, 9/14/01).

Sufficiency of evidence – cause of injuries. In a civil case, a party need not present expert testimony to establish the cause or extent of a person's injuries if the injuries are of a common nature and arise from readily identifiable causes. Testimony by the victim about his injuries is sufficient. *Choi v. Anvil*, Op. No. 5465 (Alaska Supreme Court, 9/7/01).

Jury instructions – analysis on appeal. Jury instructions are to be analyzed as a whole, rather than in isolation. *Lynden Inc. v. Walker*, Op. No. 5468 (Alaska Supreme Court, 9/14/01).

Constitutional right to privacy – physician-assisted suicide. The Alaska Constitution's guarantees of privacy and liberty do not afford terminally ill persons the right to a physician's assistance in committing suicide. In reaching this conclusion, the supreme court recognized that the prohibition on physician-assisted suicide implicates a "non-fundamental privacy or liberty interest," but the court found that the state's interests advanced by the statute, particularly the state's interest in protecting the vulnerable, justifies the impact on the patient's privacy and liberty interests. *Sampson v. State*, Op. No. 5474 (Alaska Supreme Court, 9/21/01).

Equal protection – physician-assisted suicide. Alaska's manslaughter statute, which prohibits physicians from assisting in the suicide of a terminally patient, does not violate the Alaska

Constitution's guarantee of equal protection. In reaching this conclusion, the supreme court rejected the plaintiffs' claim that there is no reasoned basis for distinguishing between physician-assisted suicide and the withdrawal of life-sustaining medical treatment. *Sampson v. State*, Op. No. 5474 (Alaska Supreme Court, 9/21/01).

Sentencing – request for limited license. A court's decision to grant a defendant's request for a limited driver's license under AS 28.15.201(a) does not constitute a modification of the defendant's sentence within the meaning of Alaska Criminal Rule 35(b). Rather, the decision to grant a limited license to a defendant whose license has been revoked under AS 28.15.181(b) is an exercise of the court's continuing supervision over the license. Therefore, a defendant's request for a limited license under AS 28.15.201(a) need not be filed within 180 days of the distribution of the judgment. *Hill v. State*, Op. No. 1766 (Alaska Court of Appeals, 9/28/01).

Collateral estoppel – administrative license revocation. Where the court in a criminal case concluded that the defendant was entitled a remedial presumption that the results of his blood test would have exonerated him of driving while intoxicated, the state was collaterally estopped from relitigating this question in the administrative license revocation proceeding. *Snyder v. State, Department of Public Safety*, Op. No. 5480 (Alaska Supreme Court, 9/28/01).

Refusal to submit to breath test – significance of remedial presumption concerning blood test. A remedial presumption that the defendant's blood test would have exonerated him of driving while intoxicated was relevant to, but not dispositive of, the charge of refusal to submit to a breath test. Indeed, in this case, the supreme court held that the presumption would not have affected the hearing officer's conclusion that Snyder had refused the breath test. *Snyder v. State, Department of Public Safety,* Op. No. 5480 (Alaska Supreme Court, 9/28/01).

Refusal to submit to a breath test – confusion about rights. A defendant who claims that his refusal to submit to a breath test was a product of confusion engendered by the administration of Miranda warnings has the burden of showing that he or she was in fact confused. *Snyder v. State, Department of Public Safety*, Op. No. 5480 (Alaska Supreme Court, 9/28/01).

Refusal to submit to a breath test – confusion about rights. Though police officers sometimes have a legal duty to clear up any confusion arising from the administration of Miranda warnings to a person arrested for drunk driving, it does not follow that police officers have a duty to clear up confusion arising from other sources*. Snyder v. State, Department of Public Safety,* Op. No. 5480 (Alaska Supreme Court, 9/28/01).